**No. SC86737**

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**IN THE**
**MISSOURI SUPREME COURT**

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**DALE DOBBINS,**

**Appellant,**

**v.**

**STATE OF MISSOURI,**

**Respondent.**

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**Appeal from the Circuit Court of Saline County**
**15th Judicial Circuit, Division 4**
**Honorable James T. Bellamy, Judge**

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# RESPONDENT'S SUBSTITUTE BRIEF AND ARGUMENT

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## JURISDICTIONAL STATEMENT

This appeal is from the denial of a motion to vacate judgment and sentence under Supreme Court Rule 24.035 in the Circuit Court of Saline County. The conviction sought to be vacated was for the felony of possession of a controlled substance with the intent to distribute, ' 195.211, RSMo 2000, for which the sentence was eighteen years in the custody of the Department of Corrections.[1] The Missouri Court of Appeals, Western

[1]Appellant was also convicted of the misdemeanor offense of driving while license was suspended or revoked, ' 302.321, RSMo 2000, and sentenced to a concurrent term of six months in the Lafayette County Jail. While appellant included this conviction in his amended motion, appellant cannot have this conviction vacated under Rule 24.035 because misdemeanor convictions cannot be challenged in a Rule 24.035 proceeding, as the rule explicitly applies only to felony convictions. Supreme Court Rule 24.035(a). Therefore, the only conviction at issue in this case is the possession conviction.

District, affirmed the denial of appellant=s post-conviction motion pursuant to Rule 84.16(b). State v. Dobbins, WD63007, order and memorandum opinion (Mo.App., W.D. February 22, 2005). On May 31, 2005, this Court sustained appellant=s application for transfer pursuant to Supreme Court Rule 83.04, and therefore has jurisdiction over this case. Article V, ' 10, Missouri Constitution (as amended 1982).

## STATEMENT OF FACTS

Appellant, Dale Dobbins, was charged by indictment in the Circuit Court of Saline County with trafficking in the second degree, or alternatively, possession of more than five grams of marijuana with the intent to distribute, as well as with driving while licence was suspended, revoked or cancelled and failure to maintain financial responsibility (Supp.L.F. 1-2). A substitute information was later filed charging appellant as a prior drug offender (Supp.L.F. 6-8). Appellant appeared before the Honorable Dennis A. Rolf on June 18, 2001, and entered a guilty plea to possession with intent to distribute and driving while revoked (Supp.L.F. 56-75).[2]

[2]The court dismissed the failure to maintain financial responsibility charge on the State=s motion after appellant was sentenced for the other crimes (Supp.L.F. 54).

At the plea hearing, the prosecutor stated that the evidence at trial as to the possession with intent charge would show on or about September 27, 2000, in Saline County, appellant, with the intent to distribute, possessed more than five grams of marijuana and knew of its presence and nature (Supp. L.F. 67). Additionally, the State submitted a document detailing the evidence that would be presented at trial, which showed that, during an inventory search of appellant=s truck following an arrest for driving while revoked and failure to provide proof of insurance, police found three plastic trash bags Acompletely full@ of freshly-cut marijuana, a large tarp containing Aa large amount@ of marijuana, a large Ziplock bag containing a leafy green substance, and several tools with green residue on the blades (Supp.L.F. 68; Plea St.Exh. 1).[3] The marijuana seized from the truck weighed over twenty pounds (Supp.L.F. 43, 85). While counsel stated that appellant did not Astipulate@ to all of the facts contained in the submitted document, he admitted that this would be the State=s evidence at a trial (Supp.L.F. 68). In a plea petition submitted as part of the plea, appellant also admitted that he possessed marijuana

[3]There are two documents marked AState=s Exhibit 1@ in the record, the plea petition from the plea hearing A(Plea St.Exh. 1)@ and the statement of facts submitted at the plea by the State, which was admitted at the evidentiary hearing A(PCR St.Exh. 1).@

with the intent to deliver or distribute some of it (Supp.L.F. 59; PCR St.Exh. 1). Appellant admitted at the hearing that the statements contained in the plea petition were true, and he admitted that he was pleading guilty because he was in fact guilty of the charges (Supp.L.F. 59, 72). The court accepted appellant=s plea (Supp.L.F. 72-73).

After the return of a pre-sentence investigation report, a sentencing hearing was held, at which the State argued for a twenty-five year sentence and appellant argued for probation or for placement in a Department of Corrections treatment program, either for 120 days under ' 559.115 or for the long-term program under ' 217.362 (Supp.L.F. 43-49). The court, relying on appellant=s prior convictions and general pattern of irresponsibility, denied appellant=s requests for probation or treatment and sentenced appellant to eighteen years in the custody of the Department of Corrections (Supp.L.F. 49-52). When appellant again renewed his request for long-term treatment, the court reiterated its refusal, stating its opinion that the spots in the treatment program were better suited for younger offenders (Supp.L.F. 54).

On November 27, 2001, appellant timely filed a *pro se* motion to vacate, set aside, or correct the judgment or sentence pursuant to Rule 24.035 (L.F. 1, 5-10). Retained counsel filed an amended motion, raising three claims of ineffective assistance of counsel, a claim of an insufficient factual basis, and a claim of an equal protection violation (L.F. 11-20). An evidentiary hearing was held by the Honorable James T. Bellamy on appellant=s claims, at which appellant presented his own testimony and that of counsel Dan Viets (Tr. 2-60). On May 21, 2003, the motion court entered findings of fact

and conclusions of law denying appellant=s motion (L.F. 39-45). This appeal follows.

## ARGUMENT

### I.

**The motion court did not clearly err in denying, after an evidentiary hearing, appellant=s claim that the trial court=s refusal to place him in a long-term treatment program under ' 217.362 violated his rights to equal protection because he was not entitled to relief on that claim in that the record shows that the decision to refuse placement in the long-term treatment program was not improperly based on appellant=s age, any consideration of appellant=s age was rationally related to a legitimate state interest, and appellant failed to prove prejudice from any such consideration of his age.**

Appellant claims that the motion court erred in denying his claim that the sentencing court violated his rights to equal protection when it denied him placement in a long-term drug treatment program (App.Br. 18). Appellant argues that the court discriminated against him because of his age and that there was no rational basis for considering his age in determining whether or not placement in the program was appropriate (App.Br. 19-25).

### A. Facts

At sentencing, the prosecutor noted that the pre-sentence investigation report indicated that appellant had multiple convictions for driving while intoxicated, a conviction for cocaine possession, and at least one conviction for marijuana possession (Supp.L.F. 41-43). Defense counsel admitted that appellant Amay be a man who also has a serious problem with substances,

both legal and illegal,@ and asked for treatment for appellant, either under ' 559.115, which would permit probation within 120 days, or long-term treatment under ' 217.362 (Supp.L.F. 47). The court asked plea counsel if counseling had been available to appellant within the past ten years; counsel replied, AI expect that it was available to him@ but noted that Ait often takes the threat of incarceration to induce someone to undertake that counseling@ (Supp.L.F. 48). The pre-sentence investigation report actually showed that appellant said that he had previously undergone counseling for substance abuse at the Mexico Area Recovery Center (Supp.L.F. 27). The court also referred to the portion of the pre-sentence investigation report which indicated that appellant did not express remorse (Supp.L.F. 48). Counsel told the court that the court had the discretion to sentence appellant to either short-term or long-term drug treatment and requested that the court consider long-term treatment pursuant to ' 217.362, RSMo (Supp.L.F. 49).

The court told appellant:

> I have several things I consider when I do sentencing. If you=re a prior and persistent offender and the range of punishment is enhanced, it=s my feeling that the punishment should be greater than what the original would have been, which in this case was 5 to 15 years.
>
> I=m also looking at the fact that it=s marijuana as opposed to meth or something more serious, which I do take into consideration, but I do not like the fact that you had so much.

> This is a very negative presentence investigation in my opinion. Normally they will at least say a few good things, and there is very, very little in here that is anything positive. Basically it just shows irresponsibility and lack of acceptance of responsibility: One daughter born out of wedlock, whom he never sees, did not provide child support; no real employment to speak of; three prior DWI contacts.

(Supp.L.F. 49-50). The court then sentenced appellant as a prior drug offender to eighteen years in the custody of the Department of Corrections for the possession with intent to distribute charge (Supp.L.F. 20, 29).

At the end of the sentencing hearing, counsel again asked the court to recommend to the Department of Corrections that appellant be sentenced to long-term drug treatment under ' 217.362 (Supp.L.F. 52-54). The court replied, ASomebody his age is not the type of person we need to be using those beds for. I think that=s better suited for somebody younger.@ (Supp.L.F. 54).

In his amended motion, appellant noted that he was forty-five years old at the time of his plea (L.F. 15). Appellant alleged that A[b]y denying him this [long-term drug treatment] program on the grounds of age, the trial court violated [appellant=s] right to equal protection and due process of the law@ (L.F. 15). Appellant alleged that, had the court not denied him equal protection under the law by using his age to disqualify him from the long-term treatment program, there was a reasonable probability that the court would have sentenced him to that

treatment (L.F. 15).

The motion court denied appellant=s claim as follows:

> Paragraph 8(e) of Movant=s First Amended Motion alleges that the trial court erred when it A. . . refused to sentence him to drug treatment on the grounds that he was too old.@ This Court has reviewed the transcript of Movant=s plea and the pre-sentence investigation, and concludes that Movant=s contention is unfounded. First, the trial court has no control over Movant=s course of treatment while in the Department of Corrections. While, after pronouncing Movant=s sentence, the trial court made a reference to Movant=s age, the entirety of the proceedings reflect that Movant was unsuitable for long term drug treatment. Movant had apparently been afforded treatment in the past to no avail. Movant=s history provides ample basis for the denial of Movant=s post-sentencing request, and Movant presents no evidence that the Trial Court=s imposition of an 18-year sentence was based upon any issue other than Movant=s extensive criminal history and social maladjustment. The Court finds that the files, records, evidence and transcripts clearly and conclusively address and refute the matters and issues raised in Paragraph 8(e) of Movant=s Rule 24.035 motion.

(L.F. 44).

**B. Standard of Review**

Appellate review of the denial of post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. Nicklasson v. State, 105 S.W.3d 482, 484 (Mo. banc 2003); Supreme Court Rule 24.035(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made. Id. On review, the motion court=s findings and conclusions are presumptively correct. Wilson v. State, 813 S.W.2d 833, 835 (Mo. banc 1991).

**C. Analysis**

1. Appellant=s Age Did Not Affect His Sentence

First, appellant is not entitled to relief on his claim because the court did not rely on age, improperly or otherwise, as the deciding factor in deciding whether or not to sentence appellant to a drug treatment program. The motion court found that the plea court=s determination of sentence was based solely on appellant=s Aextensive criminal history and social maladjustment@ (L.F. 44). This is consistent with the majority of the plea court=s statements at sentencing, in which the court referenced appellant=s prior drug offender status, his prior convictions, the large amount of marijuana involved, his failure to care for his child or provide child support, and his lack of regular employment (Supp.L.F. 49-50). Moreover, when read into the context of the entire sentencing proceeding, the court=s comment about appellant=s age was a reference to the fact that appellant had had

many years in which he could have sought counseling and improved his life; however, appellant failed to avail himself of such opportunities (Supp. L.F. 48). Finally, the comment about appellant=s age was made after the court had rejected the earlier request for the long-term treatment program and already sentenced appellant, citing appellant=s prior record and irresponsibility, and cannot be said to have definitely been part of the court=s rationale for its already-completed sentencing decision (Supp.L.F. 46-52). Therefore, appellant failed to prove that the sentencing court improperly considered his age in sentencing appellant

2. Consideration of Age in Sentencing Determinations Does Not Violate Equal Protection

Even if this Court finds that the trial court was motivated in part by appellant=s age in considering appellant=s placement in the program, such consideration did not violate equal protection. In analyzing an equal protection claim, this Court considers whether the challenged state action is rationally related to a legitimate state purpose unless a suspect class is burdened or fundamental right is impinged. Riche v. Department of Revenue, 987 S.W.2d 331, 336 (Mo. banc 1999). Differential treatment based on age does not burden a suspect class. Id. at 336 n. 3. Participation in a rehabilitation or treatment program is not a fundamental right. Goforth v. Missouri Department of Corrections, 62 S.W.3d 566, 568 (Mo.App., W.D. 2001). Thus, appellant=s equal protection claim is subject to rationality review.

When determining a defendant=s sentence, the trial court may appropriately conduct an inquiry, broad in scope and largely unlimited, either as to the kind of

information the court may consider or the source of such information. Roberts v. United States, 445 U.S. 552, 556, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980); Figgins v. State, 858 S.W.2d 853, 856 (Mo.App. W.D. 1993); Edwards v. State, 794 S.W.2d 249, 251 (Mo.App. W.D. 1990); ' 557.036, RSMo 2000 (in determining appropriate sentence, the sentencing judge shall consider all the circumstances, including the nature and circumstances of the offense and the history and character of the defendant). Age can be a relevant factor for sentencing determinations. See, e.g., ' 565.032.3(7), RSMo 2000 (age as mitigating factor in capital sentencing). And here, the use of appellant=s age was rationally related to legitimate state interests. A legitimate state purpose of prison rehabilitation programs such as the long-term drug treatment program is to help offenders overcome their addictions and be returned to society, where they can productively contribute to society. To make sure that the State receives the maximum benefit of such a program by limiting it to younger people who 1) are more likely to have been addicted to controlled substances for a shorter period of time, and thus have a better chance of overcoming their addiction, and 2) are more likely to spend more time as a productive member of society when they are released, is rationally related to the state interest of rehabilitation for society=s benefit, especially considering the costs and limited availability of spots in such programs. For the court to engage in such reasoning must be permissible in light of the discretionary nature of the decision to place a defendant in a drug treatment program because, as appellant recognizes, he had no right to placement in any specific treatment program (App.Br. 20). Goforth, 62 S.W.3d at

568-69. Therefore, any consideration of appellant=s age by the plea court was rationally related to a legitimate state interest, and thus, there was no equal protection violation in appellant=s sentencing.

3. Sentencing Requirements for ' 217.362 Were Not Met

Finally, appellant was not entitled to relief on his claim because the record refutes his claim of prejudice that there was a reasonable likelihood that he would have been placed in the program but for the improper consideration of his age (L.F. 15). The record shows that, prior to sentencing, appellant had not requested placement in this program, and thus, the court was not considering placement in the program. Under ' 217.362 as it read at the time of appellant=s plea, the court was required to notify the department for screening to determine whether appellant was eligible for the program and if there was space available in the program. ' 217.362.2, RSMo 2000. Nothing in the plea hearing record shows that appellant asked to court to consider the long-term treatment program under ' 217.362 at the time of the plea; while there were references to treatment programs, this specific one was never discussed (Supp.L.F. 57-75). Appellant=s pre-sentence investigation report reveals no such request from the court to corrections to determine eligibility or availability of the program (Supp.L.F. 24-28). While appellant requested placement in the program at sentencing, he did so only as a final alternative after first requesting probation or placement in a 120-day program under ' 559.115 (Supp.L.F. 45, 49). Therefore, the record shows that appellant had not been screened for entry into the long-term treatment program, thus showing that appellant

could not have been placed into the program at sentencing regardless of the plea court=s inclination to either grant or deny placement in the program at the time. Due to the failure to request the long-term treatment program prior to his last-ditch attempt at sentencing, thus leading to the lack of necessary screening for the program, appellant failed to prove that there was a reasonable probability of placement in the program but for the consideration of his age.

For the foregoing reasons, appellant=s first point on appeal must fail.

**II.**

**The motion court did not clearly err in denying, after an evidentiary hearing, appellant=s post-conviction claim that counsel was ineffective for advising appellant that he could later petition for a sentence reduction pursuant to ' 558.046 because appellant failed to prove he was entitled to relief in that he failed to prove that counsel=s advice was constitutionally unreasonable, as the sentence reduction statute does not explicitly exclude prior drug offenders from petitioning for early release, or that he suffered the required prejudice, as the motion court found there was not a reasonable probability that appellant would have gone to trial instead of pleading guilty based on the mere hope of a sentence reduction at some later time.**

Appellant claims that the motion court clearly erred in denying his claim that counsel was ineffective for advising him that he could petition the plea court for a sentence reduction under ' 558.046 (App.Br. 26). Appellant argues that counsel=s advice was erroneous because, as a prior offender, he cannot petition for a sentence reduction (App.Br. 27). Appellant contends that he pled guilty in reasonable reliance on this advice and that, but for this advice, there was a reasonable likelihood that he would have gone to trial instead of pleading guilty (App.Br. 29-40).

## A. Facts

On June 18, 2001, the parties appeared for the guilty plea hearing (Supp. L.F. 56). Plea counsel announced that appellant was appearing on an open plea (Supp. L.F. 57). Appellant admitted to the court that he understood his Petition to Enter a Plea of Guilty and that the

answers in that document were truthful (Supp. L.F. 59). Appellant admitted that he understood the substitute information and that he was being charged as a prior drug offender (Supp. L.F. 62, 66). Appellant admitted that on or about February 5, 1990, he was found guilty of the felony of possession of cocaine (Supp. L.F. 66). He also stated that he understood that he did not have to plead guilty and could instead proceed to trial (Supp. L.F. 63).

The court told appellant that the range of punishment for the class B felony of possession with the intent to distribute was from ten to thirty years, or life imprisonment (Supp. L.F. 69). The State announced that appellant=s plea was open and that it would make its recommendation at the time of sentencing (Supp. L.F. 70). The following ensued:

> Q. Knowing there is not going to be a recommendation made, that it would be up to me to sentence you, there would be no guarantee about what the amount of time would be. Do you understand that?
>
> A. Yes, I do.
>
> Q. I have the option of going anywhere from ten to thirty, or life. Do you understand?
>
> A. Yes, I understand.
>
> Q. Okay.
>
> [Counsel]: Your Honor, I=ve also pointed out to the defendant that the Court also has the option to suspend execution of the sentence, or to order him into a drug treatment program in

the Department of Corrections. And for what it's worth, our recommendation would be that the Court exercise its discretion to do so.

THE COURT: I understand that. And that is an option.

[Appellant], I'm not telling you I'm not going to consider it, but I've never had a defendant come back, and say, you gave me less than you told me what the possibility was. That's why I pointed out what the bad side is. Okay?

A. Okay.

Q. After what we have discussed, do you still wish to enter your plea today?

A. Yes, I do.

(Supp. L.F. 70-72).

In his guilty plea petition, appellant acknowledged that the enhanced range of punishment for the class B felony was from ten to thirty years or life imprisonment (Plea St.Exh. 1 p. 3). Appellant admitted that no officer or governmental agent had promised or suggested a particular sentence, probation, or any other form of leniency if appellant pled guilty, and appellant admitted that he knew that his sentence was solely in the court's control (Petition, page 4). Appellant also acknowledged, "Unless stated in the Prosecutor's recommendation, no one has told or promised me I would receive probation or parole and I understand that I do not have a right to receive probation or parole and whether or not I receive

probation or parole is solely in the Court=s discretion@ (Petition, page 6).

At sentencing, plea counsel announced, A. . . I=m reasonably certain the Court has full discretion to suspend an execution of the sentence or, for that matter . . . to suspend imposition@ (Supp. L.F. 39). Counsel also asked the court to sentence appellant to drug treatment and to release him on probation if appellant received a positive report (Supp. L.F. 40). Both plea counsel and the State believed that appellant was eligible for parole (Supp. L.F. 48-49). After further discussion, the court announced sentence at eighteen years of imprisonment in the Department of Corrections on Count I and a term of six months in county jail on Count II (Supp. L.F. 52). Counsel asked the court if it would recommend a sentence of long-term drug treatment, but the court declined to do so (Supp. L.F. 54).

In his amended motion, appellant alleged that counsel was ineffective for advising him to enter an open guilty plea (L.F. 12). Appellant alleged that the State charged him as a prior drug offender and that the State would not dismiss that allegation unless appellant accepted a recommendation of ten years of imprisonment without the possibility of probation (L.F. 13). Appellant stated that this sentence was the minimum sentence he could have received as a prior drug offender; however, counsel advised him to enter an open plea and therefore waive opportunities to appeal the trial court=s rulings on pretrial motions (L.F. 13). Appellant alleged that counsel mistakenly believed that if appellant were sentenced to prison, appellant could have his sentence reduced pursuant to ' 558.046, if appellant successfully completed drug treatment while in prison (L.F. 13). However, appellant stated that the provisions of ' 558.046 are not available to prior offenders like himself (L.F. 13). Appellant claimed that had

counsel not advised him to plead guilty, he would have gone to trial (L.F. 13).

At the evidentiary hearing, counsel testified that he told appellant that he Athought@ that the court would not inflict a harsh sentence (Tr. 8). In so thinking, counsel advised appellant not to accept the State=s offer of a ten-year sentence without the possibility of probation (Tr. 7-8). Counsel stated that he and appellant discussed ' 558.046 and that, at the time of their discussions, counsel thought that sentencing reduction under ' 558.046 would be available Aif the judge gave [appellant] a harsher sentence than I anticipated and hoped he would be given@ (Tr. 8-10). Counsel stated that relief under the statute Ais only available to those without prior felony convictions;@ when asked if he would have recommended an open plea if he had Aknown@ that relief under ' 558.046 was not available to appellant, counsel replied, AProbably not@ (Tr. 10).

Counsel said that the range of punishment was enhanced to the term available for a class A offense, but that he hoped that the court would impose the minimum sentence and grant probation (Tr. 11). Counsel acknowledged that he did not promise appellant that appellant would receive probation, yet commented that he advised appellant that he would receive a much shorter sentence than appellant actually received (Tr. 19-21). Counsel believed that he told appellant that sentence reduction was within the court=s discretion (Tr. 21). Counsel also admitted that both he and appellant knew that, even if sentence reduction was available to appellant, the option to reduce the sentence was discretionary and that there was no promise that the court would reduce the sentence (Tr. 31, 33).

Appellant testified that he and plea counsel discussed a possible sentence reduction (Tr.

45). Appellant said that counsel told him that if he completed a drug program, he would be eligible for sentence reduction and that counsel Awould have my sentence reduced at a later time@ (Tr. 46). Appellant claimed that he relied upon counsel=s advice (Tr. 46). Appellant also admitted, however, that no one promised him probation (Tr. 50). Appellant also admitted that he knew that his crime of possession with t he intent to distribute carried a range of punishment from ten to thirty years or life imprisonment (Tr. 53-54, 57). Appellant also understood that drug treatment and probation were possibilities, as was a sentence of Aflat jail time@ (Tr. 57). Appellant ultimately admitted that he also realized that a sentence of thirty years of imprisonment was also possible (Tr. 58-59).

In its findings, the motion court denied relief, stating:

> 9. Essentially, Movant contends that his decision to enter a guilty plea was contingent solely upon his belief that, in the event of an unreasonable outcome, he would be eligible for sentence reduction pursuant to RSMo ' 558.046 (2000). This court must determine whether or not that belief was reasonable in light of the potential adverse consequences of a trial.
>
> 10. Movant=s post-conviction relief counsel acknowledged during the evidentiary hearing . . . that the likelihood of prevailing at trial was remote. Further, Movant knew that he faced a life sentence upon a finding of guilty, whether by plea or at trial. Movant further knew that if anyone

> made any promises or suggestions, they did not have the authority to do so. Movant knew that his sentence was solely in the discretion of the trial judge. Movant further knew that he did not have a right to probation or parole, those matters being in the sole discretion of the trial judge. . . . Movant knew that he was pleading guilty to the charge of possession of a controlled substance with intent to distribute, that it was a class B felony, and that the range of punishment was 10-30 years or [l]ife. . . .

(L.F. 51-52). The motion court further stated that, despite his personal belief that his eighteen-year sentence was unreasonable, appellant knew that there was a possibility he could receive that sentence and that probation, parole, or relief pursuant to ' 558.046 Awere absolutely in the discretion of the trial judge@ (L.F. 52). Moreover, the court noted that in his Petition to Enter a Plea of Guilty, appellant acknowledged that no one had promised or suggested to him that he would receive a particular sentence, probation, or any other form of leniency and that if someone had done so, that person had no authority to make such a representation (L.F. 52-53). The motion court also found Athat Movant=s contention that he would not have entered a guilty plea but for his belief that he would be **eligible for discretionary relief** under RSMo ' 558.046, is not reasonable@ (L.F. 53) (emphasis in original).

## B. Standard of Review

Appellate review of the denial of post-conviction relief is limited to a determination

of whether the findings of fact and conclusions of law are clearly erroneous. Nicklasson v. State, 105 S.W.3d 482, 484 (Mo. banc 2003); Supreme Court Rule 24.035(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made. Id. On review, the motion court=s findings and conclusions are presumptively correct. Wilson v. State, 813 S.W.2d 833, 835 (Mo. banc 1991).

**C. Appellant Failed to Prove He was Entitled to Relief**

To prevail on an ineffective assistance of counsel claim, a movant must establish that the performance of counsel did not conform to the degree of skill, care, and diligence of a reasonably competent attorney and that movant was prejudiced by his counsel=s poor performance. State v. Hall, 982 S.W.2d 675, 680 (Mo. banc 1998), cert. denied 526 U.S. 1151 (1999); Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In the context of a guilty plea, any claim of ineffective assistance of counsel is immaterial except to the extent that it impinges the voluntariness and knowledge with which the plea is made. State v. Roll, 942 S.W.2d 370, 375 (Mo. banc 1997). To prove prejudice, a movant must prove that, but for counsel=s errors, he would not have pleaded guilty but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985).

1. Appellant Failed to Show Counsel=s Advice was Constitutionally Unreasonable

In the case at bar, the motion court did not clearly err in denying appellant relief because appellant failed to prove that counsel was ineffective or that he was prejudiced

by counsel=s advice. The applicable statute reflects that counsel=s belief that appellant could receive sentence reduction was not necessarily incorrect, and thus, appellant failed to prove that counsel=s advice was constitutionally unreasonable. Even though counsel testified at the evidentiary hearing that his advice was incorrect, it may not have been unreasonable under a plain reading of the sentence reduction statute. Section 558.046 permits a person convicted of a non-violent felony involving alcohol or illegal drugs to petition the sentencing court for a sentence reduction if the person successfully completes a Adetoxification and rehabilitation program[.]@ ' 558.046, RSMo 2000. The statute explicitly excludes prior, persistent, dangerous, and persistent misdemeanor offenders as defined by ' 558.016, persistent sexual offenders as defined by ' 558.018, and class X offenders as defined by ' 558.019. ' 558.046, RSMo 2000. Appellant was not charged nor convicted under any of these statutes, but was instead charged as a prior drug offender as defined by ' 195.275 (Supp. L.F. 7, 29). ' 195.275, RSMo 2000. Thus, by its explicit terms, ' 558.046 does not exclude prior drug offenders under ' 195.275 from petitioning for a sentence reduction. Statutory language must be given its plain and ordinary meaning. Spradlin v. City of Fulton, 982 S.W.2d 255, 258 (Mo. banc 1998). If the legislature had wanted to exclude prior drug offenders, it certainly could have listed that exclusion along with the others. Thus, under the plainest reading of the statute, it appears to permit a prior drug offender the power to at least petition for early release.

Moreover, ' 558.046 is designed to help lessen the punishment for offenders who

committed their crimes due to substance abuse problems. As the section explicitly excludes the prior drug offender statute from a reading of the statute, it would not be unreasonable for an attorney to believe that sentence reduction could be granted to a prior drug offender, as such a person would seemingly be squarely within the class of defendants this statute is directed toward. Therefore, counsel was, at the very least, not constitutionally unreasonable for advising his client that the sentence reduction statute was applicable to his case, as counsel=s advice was consistent with the plain language of the statute.

2. Appellant Failed to Demonstrate Prejudice

In any event, appellant was not entitled to relief on his claim because he failed to prove that the advice regarding the possibility of sentence reduction created a reasonable probability that he would not have pled guilty but for the advice. The record reflects that appellant had never been promised a sentence reduction (Tr. 31, 33). While counsel and appellant may have believed that reduction was possible and hoped for such an outcome, appellant understood that reduction was an option at the court=s discretion and not a guarantee (Tr. 21, 58). Moreover, appellant knew all along that the plea court had the discretion to sentence him to any term within the range of punishment, including life imprisonment (Supp. L.F. 70-71, Tr. 58-59). Therefore, all that appellant could have possessed at the time of his plea was the mere hope that, at some point in the future, the plea court may possibly consider a sentence reduction, not the belief that he would ever receive such a reduction.

Based on the absolutely speculative nature of any possibility of ever getting an early release, the motion court found that any likelihood that appellant=s decision to plead guilty rested on this advice was unreasonable, and thus that appellant failed to prove a reasonable likelihood that he would have gone to trial instead of pleading guilty but for this advice (L.F. 51-53). That finding cannot be considered clearly erroneous. The probability that appellant would have decided to go to trial based but for the erroneous advice must be reasonable. Hill, 474 U.S. at 59. Thus, the motion court=s review of the circumstances surrounding the case is necessarily objective C the court is not required to rely only on appellant=s self-serving statements that he would have gone to trial, but is to look at the situation facing appellant to see if it was reasonably probable that appellant would have decided not to plead guilty. Here, the motion court did not believe appellant would have made the decision to plead guilty based on the hope that a sentencing court, which had already given him a harsh sentence, would then turn around and lighten that sentence. Instead, the far more likely hope upon which appellant=s decision to plead guilty rested was the hope of a light sentence in the first place. That appellant claimed he would not have pled guilty but for the advice regarding the plea is irrelevant, as the motion court was free to disbelieve such a claim. State v. Hunter, 840 S.W.2d 850, 863 (Mo. banc 1992), cert. denied 509 U.S. 926 (1993); Rhodes v. State, 157 S.W.3d 309, 313 (Mo.App., S.D. 2005); Slater v. State, 147 S.W.3d 97, 101 (Mo.App., W.D. 2004); Estes v. State, 950 S.W.2d 539, 541-42 (Mo.App., E.D. 1997). Therefore, the motion court did not clearly err in finding that appellant failed to prove that there was a reasonable probability that he

would not have pled guilty but for counsel=s advice as to petitioning for a sentence reduction.

In light of the foregoing, appellant=s second point on appeal must fail.

**III.**

**The motion court did not clearly err in denying, without an evidentiary hearing, appellant=s claim that there was an insufficient factual basis for his guilty plea to possession of marijuana with the intent to distribute because there was a sufficient factual basis that appellant intended to distribute the marijuana in that, at the plea hearing, the prosecutor stated the elements of the offense at the plea hearing, appellant admitted that he understood the charge, and appellant stated he was pleading guilty because he was guilty of the offense, and, in the plea petition submitted at the hearing, appellant explicitly admitted that he had intended to distribute the marijuana at issue.**

**Further, as there was a sufficient factual basis for the plea, counsel was not ineffective for failing to make a meritless objection that there was an insufficient factual basis. (Responds to Appellant=s Points III and IV).**

Appellant raises two claims regarding the factual basis of his guilty plea to possession of marijuana with intent to distribute (App.Br. 41, 48). In Point III, appellant claims there was an insufficient factual basis for his plea because the State did not establish sufficient facts showing that he intended to distribute the marijuana found in his possession (App.Br. 41-47). In Point IV, appellant complains that counsel was ineffective for failing to object to the insufficient factual basis (App.Br. 48-50).

**A. Amended Motion and Findings**

In his amended motion, appellant alleged that he was denied due process of law when he

was convicted without a factual basis to support his guilty plea (L.F. 12). Appellant acknowledged that State=s Exhibit 1 Adescribed the seizure of green marijuana and garden tools,@ but claimed that the exhibit Acontained no facts which would have established that [appellant] had an intent to distribute the marijuana which was seized from him@ (L.F. 14). Appellant specifically noted the absence of Ascales, individual packaging materials, notations of drug transactions, or other evidence seized which would indicate an intent to distribute@ (L.F. 14).

In its findings, the motion court denied relief, stating:

> 15. Paragraphs 8 (c & d) of Movant=s First Amended Motion allege that trial counsel was ineffective when the State failed to present, and counsel failed to object to the lack of a factual basis for the plea. The Court has reviewed the transcript of Movant=s plea, and concludes that a sufficient factual basis was presented by the State. Movant apparently contends that quantity alone is insufficient to infer the intent to distribute. The Court finds that the quantity in this case was consistent only with distribution. The Court further finds that facts supporting all elements of the offense were included in either oral or written presentations to the Court. The Court finds that the files, records, evidence and transcripts clearly and conclusively address and refute the matters and issues raised in Paragraphs 8 (c & d) of

Movant=s Rule 24.035 motion.

(L.F. 44).

**B. Standard of Review**

Appellate review of the denial of post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. Nicklasson v. State, 105 S.W.3d 482, 484 (Mo. banc 2003); Supreme Court Rule 24.035(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made. Id. On review, the motion court=s findings and conclusions are presumptively correct. Wilson v. State, 813 S.W.2d 833, 835 (Mo. banc 1991).

**C. There was a Sufficient Factual Basis as to Appellant=s Intent to Distribute**

A plea court may not enter judgment on a plea of guilty until it determines that there is a factual basis for the plea. Ivy v. State, 81 S.W.3d 199, 202 (Mo. App., W.D. 2002); Supreme Court Rule 24.02(e). A plea itself forms the factual basis for a guilty plea where it is voluntarily and understandingly made, as well as unequivocal as to the factual requisites necessary to establish every element of the offense. Ivy, 81 S.W.2d at 202. A factual basis is established when the information clearly charges the defendant with all elements of the crime, the nature of the charge is explained to the defendant, and the defendant admits guilt. Id. The factual basis does not have to be established from the defendant=s words alone as long as the basis exists. State v. Taylor, 929 S.W.2d 209, 217 (Mo. banc 1996), cert. denied 519 U.S. 1152 (1997). Further, it is not

necessary that the facts sufficient to establish each element of the crime be adduced at the plea hearing, Aso long as the defendant has been made aware of the nature of the charges sometime prior to the court=s acceptance of his plea.@ Felton v. State, 103 S.W.3d 367, 370 (Mo.App., S.D. 2003).

Here, there was a factual basis for appellant=s plea. First, appellant was clearly charged with all of the elements of possession with intent to distribute, and those elements were recited to appellant at the plea hearing when the prosecutor stated, AJudge, we expect the evidence to be that on or about September 27th of last year in Saline County, Missouri, the defendant, ***with the intent to distribute***, possessed more than five grams of marijuana, a controlled substance, knowing of its presence and nature@ (emphasis added) (Supp.L.F. 66-67). ' 195.211, RSMo 2000. Appellant later stated that he understood he was charged with actually committing the offense of possession with the intent to distribute and that was the offense to which he was pleading guilty, and that he was pleading guilty because he was guilty (Supp.L.F. 69-70, 72). This was sufficient to establish the factual basis for appellant=s guilty plea.

Further, and even more directly, a factual basis for appellant=s intent to distribute comes from his plea petition, which he testified was true (Supp.L.F. 59). In relevant part, that petition stated:

> I know that the Court must be satisfied that there is a factual basis for PLEA OF GUILTY before my plea can be accepted. I represent to the Court that I did the following acts

in connection with the charge(s) made against me: possessed marijuana ***with intent to deliver or distribute*** some of it[.]

(PCR St.Exh. 1 p. 1-2)(emphasis added). Thus, appellant explicitly established the factual basis for his intent to distribute marijuana by stating that he intended to distribute it. As appellant=s explicit statement of his intent fully established the factual basis for that element, there was no need for the State to present any other facts showing that appellant intended to distribute the marijuana.

Appellant claims that his position is supported by Jones v. State, 117 S.W.3d 209 (Mo.App., S.D. 2003). In Jones, a plea to second-degree assault for knowingly inflicting injury by means of a dangerous instrument, there was no reference to the dangerous instrument used in the assault to ensure that the object used actually met the definition of a Adangerous instrument.@ Jones, 117 S.W.2d at 211-13. That case is inapplicable. In this case, appellant admitted that he was guilty of possessing the marijuana Awith the intent to distribute.@ Thus, there is no missing fact or obscurity in this record**C**appellant admitted the charged intent, and thus eliminated any doubt that there were sufficient facts showing that appellant intended to distribute the marijuana (PCR St.Exh.1 1-2). Therefore, Jones provides appellant no relief.

Because appellant admitted that he was guilty of the offense of possession of marijuana with the intent to distribute and actually admitted that he intended to distribute marijuana, there was a sufficient factual basis for the guilty plea. For that reason, had

counsel objected to the lack of a sufficient factual basis, such an objection would have, by necessity, been overruled. Counsel will not be deemed ineffective for failing to make a meritless objection. Middleton v. State, 103 S.W.3d 726, 741 (Mo. banc 2003). Therefore, counsel was not ineffective for failing to object to the factual basis for appellant=s plea.

For the foregoing reasons, appellant=s third and fourth points on appeal must fail.

## CONCLUSION

In view of the foregoing, the respondent submits that the denial of appellant's Rule 24.035 motion should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 7677 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 14th day of November, 2005, to:

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## APPENDIX